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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Libby Glass, Inc.**

Serial No. 75/250,499

Gregg W. Emch of Emch, Schaffer, Schaub & Porcello Co.,
L.P.A. for Libby Glass, Inc.

Angela M. Micheli, Trademark Examining Attorney, Law Office
108 (David E. Shallant, Managing Attorney).

Before **Walters**, Bottorff and McLeod, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Libby Glass, Inc. filed an application to register the design shown below on the Principal Register as a trademark for "beverage glassware."¹ In its application as originally filed, applicant claimed that, as a result of substantially exclusive and continuous use in commerce for the five years preceding the filing of the application, the design has

¹ Application Serial No. 75/250,499, filed March 3, 1997, in International Class 21, based on use in commerce, alleging first use and first use in commerce as early as 1989.

become distinctive of applicant's glassware and is therefore registrable under the provisions of Section 2(f) of the Trademark Act, 15 U.S.C. 1052(f). The application record includes the statement that "[t]he mark consists of a beverage container with side panels extending from a pentagon-shaped base to a circular rim or lip."



The Examining Attorney issued a final refusal to register, under Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. 1051, 1052 and 1127, on the ground that the design is a nondistinctive configuration of applicant's goods that does not function as a trademark, and applicant has not established that the configuration has acquired distinctiveness, under Section 2(f) of the Trademark Act.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

The Examining Attorney contends that applicant's configuration is not inherently distinctive and applicant has not demonstrated that it has acquired distinctiveness as a trademark. She argues that purchasers of glassware are familiar with glassware products featuring multi-sided bases and sides which lead up to round lips, so that such purchasers are unlikely to view the configuration of applicant's glasses as anything other than one of the many possible ornamental designs for glasses. In support of her position, the Examining Attorney submitted photographs of third-party glassware of various sizes and shapes, a number of which feature polygonal bases and sides; and advertisements from various catalogs and store circulars showing that glassware is available in a variety of shapes and sizes.

Applicant contends that the configuration sought to be registered, although de facto functional in the sense that applicant's glassware is used to contain beverages, is not de jure functional in the sense that it embodies a superior design or one that competitors need to be able to copy in order to compete successfully in the market for glassware. Applicant further contends that the two declarations of Jeffrey W. Joyce, applicant's corporate marketing director,

establish that the configuration has become distinctive of applicant's goods by virtue of extensive use and promotion.

The first declaration states that the "mark" is not the subject of either a design patent or a utility patent; that alternative designs which are equally efficient and not more costly to produce are available to competitors; that applicant has advertised its glassware, "including the feature embodied in the proposed mark," through catalogs, a copy of one of which was attached as an exhibit to the declaration; that applicant had spent more than \$75,000 to advertise and promote "the proposed mark"; and that the declarant believes that "the proposed mark" has acquired distinctiveness as a source indicator for the goods identified in the application.

The second declaration from Mr. Joyce expands on his previous declaration. He provides information about applicant's business activities, including the fact that between 1989 and 1998, applicant sold almost nine hundred thousand dozen glasses incorporating the "mark" for over nine million dollars, with advertising expenditures for the years 1996 through 1998 of approximately 19% of sales, or \$170,199, \$307,901 and \$364,018, respectively.

Several exhibits accompanied this declaration. An introductory advertisement, Exhibit A, titled "Introducing

Inverness DuraTuff® Tumblers," shows three glasses, two of which are filled with beverages. The bases of the three glasses appear to be polygonal, although one cannot discern from the photo how many sides they have, or even if they all have the same number of sides. The text of the advertisement, however, includes the following sentence: "Traditional clear panels make a simple, elegant statement, extending from the pentagonal base to the circular rim." The declaration states that these advertisements were provided to applicant's salesmen and distributors, but the exact number that were printed is not stated. Exhibit B, another example of what applicant describes as "early literature" used to promote applicant's goods, shows three glasses in a photo similar to the one in Exhibit A. The heading is "PRESENTING... Inverness Tumblers." The text includes the following: "Inverness offers classic styling—a heavy, pentagonal shaped base that rises to a lip that's round and DuraTuff® treated for built-in resistance to thermal and mechanical shock."

Exhibits C through G are brochures, catalogs, order forms, and so forth. The glasses in question are shown in most of these documents, but there is no mention of the features that applicant now claims as its distinctive trademark. In fact, these exhibits show that applicant

produces glassware in a variety of configurations, with bases in many different shapes.

Exhibit H is a photo of a shipping carton for applicant's "INVERNESS" glassware. In addition to the word mark, stock number and quantity indication, the box bears an illustration of a glass, as seen from the side, although the features claimed as the trademark are obscured.

By filing its application for registration with a claim of distinctiveness under Section 2(f), applicant has conceded that the design it seeks to register is not inherently distinctive and, thus, not registrable on the Principal Register without evidence of acquired distinctiveness.² Both applicant and the Examining Attorney agree that the issue in this appeal is whether applicant's shape of its beverage glassware, i.e., the pentagonal base extending into a round lip at the top, has acquired distinctiveness as an indication of the source of applicant's goods.

² Although applicant made a statement in an early response that its alleged mark is inherently distinctive, applicant filed its application with a Section 2(f) claim of acquired distinctiveness. Further, the Supreme Court has held that product configurations are never inherently distinctive in *Wal-Mart Stores Inc. v. Samara Brothers Inc.*, 120 S. Ct. 1339, 54 USPQ2d 1065 (2000). See also *In re Ennco Displays Systems, Inc.*, 2000 TTAB LEXIS 235, (Serial No. 74/439,613 et. al., April 4, 2000).

The burden of establishing acquired distinctiveness is on applicant. *In re Automatic Radio Mfg. Co.*, 404 F.2d 1391, 160 USPQ 233 (CCPA 1969). Based on the record before us, we conclude that applicant has not established that the configuration sought to be registered has acquired distinctiveness as an indication of the source of applicant's glassware.

Although it is clear from the record that applicant's Inverness line of beverage glassware has been actively promoted and sales have been significant, there is very little evidence from which we can conclude that prospective glassware purchasers view the shape of glassware with pentagonal bases and round lips as an indication of the source of that glassware.

Neither Mr. Joyce's conclusions regarding acquired distinctiveness, which are, essentially, self-serving for applicant, nor the exhibits to his declaration establish that the configuration is, or is likely to be, perceived as a trademark by prospective glassware purchasers. Exhibit C does not show or mention the configuration of applicant's glassware. Although Exhibits D through G picture the glassware in question, the exhibits contain nothing that constitutes even an attempt to draw viewers' attention to the design as an indication of the source of the goods. As

noted above, Exhibit H depicts a glass on the carton in which applicant's goods are shipped, but the features that applicant contends constitute its trademark are not even visible, much less promoted, as applicant's trademark.

According to Mr. Joyce, the advertisements contained in Exhibits A and B were distributed to applicant's own salesmen and distributors, rather than to prospective purchasers, during the initial effort to market the goods. There is no indication whether or to what extent these advertisements were seen by prospective purchasers. Further, even if these advertisements were distributed beyond the introductory period, and to actual or potential purchasers of the goods instead of to applicant's own salesmen and distributors, the ways in which the advertisements refer to the features in question do not indicate promotion, much less perception in the marketplace, of these features as applicant's trademark. For example, Exhibit A touts the "[t]raditional, clear panels" in its Inverness tumblers, stating that the panels "make a simple, elegant statement, extending from the pentagonal base to the circular rim." Exhibit B describes the same feature as "classic styling." These two statements are at best rather lyrical descriptions of the shape of applicant's Inverness tumblers. Characterizing

its design as a traditional design with classic styling is hardly promotion of the configuration as a trademark, nor is it evidence that the configuration applicant seeks to register is perceived in the marketplace as an indication of the origin of beverage glassware.

In conclusion, applicant has presented insufficient evidence from which to conclude that the non-inherently distinctive configuration that is the subject of this application has acquired distinctiveness as a source identifier in connection with applicant's beverage glassware.

Decision: The refusal to register under Sections 1, 2 and 45 of the Act on the ground that the design is not inherently distinctive and applicant has not established acquired distinctiveness under Section 2(f) of the Act is affirmed.

C. E. Walters

C. M. Bottorff

L. K. McLeod
Administrative Trademark Judges
Trademark Trial & Appeal Board

Ser No. 75/250,499